



S T A T E B A R O F M I C H I G A N

*p* 517-346-6300

*p* 800-968-1442

*f* 517-482-6248

www.michbar.org

June 24, 2005

Corbin Davis  
Clerk of the Court  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

306 Townsend Street  
Michael Franck Building  
Lansing, MI  
48933-2083

**Re: ADM File No. 2004-53  
Proposed Amendment of Rule 9.124 of the Michigan Court Rules**

Dear Clerk Davis:

At its June 10, 2005 meeting, the Board of Commissioners of the State Bar of Michigan considered the above proposed amendment published for comment. During its consideration of the proposal, the Board reviewed comments submitted by the Criminal Jurisprudence and Practice Committee, Special Committee on Grievance, the Lawyers and Judges Assistance Committee and the Senior Lawyers Section. Collectively, the comments reflected a concern with the breadth of the proposed disclosure, its potential discouraging effect on seeking treatment for disabling conditions, and a recommendation that the reach of the proposal be fine-tuned. Substantive comment and proposed alternative language was submitted by the Lawyers and Judges Assistance Committee, and is enclosed for your consideration.

In response to these concerns and in recognition of the intent of the proposal to increase the effectiveness of the attorney grievance process, the Board voted by a unanimous vote to **support** a court rule modification requiring disclosure of relevant financial data including conciliation agreements with taxing authorities and complaints for nonfiling of income tax returns or tax evasion, and disclosure of information regarding treatment for a mental or emotional condition where such condition was a basis for disqualification of the lawyer from the practice of law and disclosure of participation as a party in litigation.

We appreciate the opportunity to offer this position for the Court's consideration, and offer our assistance in possible revisions to the proposal in line with the Board's position. Please contact me with any further questions.

Sincerely,

John T. Berry  
Executive Director

CC: Lynn Richardson, Administrative Counsel, Michigan Supreme Court  
Nancy J. Diehl, President  
Janet Welch, General Counsel



## **Report on Public Policy Position**

**Name of Section or Committee:**

Lawyers and Judges Assistance Committee

**Contact Person:**

Jack Gilbreath

**Email:**

jsgilbreath@barrlawfirm.com

**Proposed Court Rule or Administrative Order Number:**

**2004-53 - Proposed Amendment of Rules 9.124 of the Michigan Court Rules**

The proposed amendments of MCR 9.124(B)(1) would expand the information a petitioner for reinstatement is required to include in or attach to the petitioner's personal history affidavit. The proposed amendment of subrule (b) would add a requirement that the petitioner, at the grievance administrator's request, provide authorization for the grievance administrator to obtain a copy of the petitioner's personnel file regarding any employment held since the time of disqualification. The proposed amendment of subrule (f) would require a petitioner to attach copies of petitioner's tax returns from the date of disqualification to the date of the petition for reinstatement. The proposed amendment of subrule (l) would add a requirement that a petitioner provide copies of any civil complainants and judgments or orders with respect to any outstanding civil judgments against the petitioner. According to the proposed amendment of subrule (m), a petitioner would be required to provide copies of criminal complaints and judgments of conviction or dismissals for any criminal case in which the petitioner was a defendant or a witness. Subrule (n) would require a petitioner to state on his personal affidavit whether since the date of disqualification the petitioner received treatment for mental or emotional disabilities or substance abuse or gambling addiction. If the petitioner received such treatment, the petitioner would be required to provide a statement from the service providers that contained a diagnosis of the condition and prognosis for recovery.

The proposed amendment of 9.124 (C) simply codifies what already occurs in hearings on petitions for reinstatement and appeals from decisions following those hearings.

**Date position was adopted:**

April 7, 2005

**Process used to take the ideological position:**

By quorum vote of LJAC section members

**Number of members in the decision-making body:**

12

**Number who voted in favor and opposed to the position:**

11 in favor 1 opposed

**Position:**

Agree in principle, with recommendations as follow:

1. Paragraph (l) is ambiguous in that it requires petitioner to disclose whether there are any outstanding judgments against the petitioner, but then also requires petitioner to provide copies not only of the complaints and judgments in such cases, but also any orders of dismissal of such case, in which event by definition, a judgment never would have entered.
2. Paragraph (m) requires petitioner to disclose whether the petitioner was not only a defendant, but also a witness in any criminal case and to provide all relevant information concerning any such case including title, docket number, court and copies of any judgments of conviction or order in such cases. This makes perfect sense with respect to any case in which petitioner was the defendant. However, if defendant was only a witness, it would seem appropriate to disclose that fact together with a statement of explanation, but it should be the responsibility of the administrator to pursue any further inquiry into such cases by obtaining records of these cases in which petitioner was only a witness.
3. Paragraph (n) is overbroad in that requires petitioner to provide evaluations, diagnoses and prognoses from *any and all sources of treatment for mental, emotional or addiction disabilities*. This is overbroad and would likely result in a “chilling effect” for a person who is suffering from an ancillary personal challenge wholly unrelated to petitioner’s original basis for attorney disqualification from seeking out assistance. Secondly, the word disability is exactly the kind of “label” LJAP should seek to change. Individuals with personal challenges may have an impairment in their ability to practice law; however, having a condition does not render one “disabled”. This is a poor choice of word; impairment is preferred.

Proposed language to consider for subsection (n) may include:

“Whether the petitioner was subject to treatment of counseling for mental or emotional impairments, or for substance abuse or gambling addictions, which treatment or counseling was the basis for such disqualification and the basis for referral and assessment by the State Bar of Michigan Lawyers & Judges Assistance Program since the time of disqualification; if so, the petitioner must provide a current statement from the Lawyers & Judges Assistance Program setting forth an evaluative conclusion regarding the petitioner’s impairment(s), petitioner’s treatment records and prognosis for recovery; and further, in such an event, the LJAP administrator may request petitioner to provide same from other *relevant* treating sources.”

Additionally, insofar as the Lawyers & Judges Assistance Program is utilized we would recommend that the following language be incorporated into this section:

The Attorney Monitoring Program and those working with the program in any capacity, whether volunteer or otherwise, shall be provided all confidentiality and immunity protection afforded the Lawyer's and Judges Assistance Program under MCR 9.125.

**The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:**

<http://courts.michigan.gov/supremecourt/Resources/Administrative/2004-53-030905.pdf>

## **RECOMMEND STATE BAR ACTION ON THIS ISSUE:**

### **Arguments for the position:**

The LJAC contends that the proposed changes, as written are ambiguous (subsection l), unreasonably burdensome on petitioners (subsection m), and are overbroad with a probable chilling effect on petitioner seeking assistance for any other possible personal or family challenge (subsection n).

### **Arguments against the position (if any):**

None that we are aware of with the exception of standard basic position that any and all means undertaken to protect the public are justified.

**If the State Bar currently has a position on this subject matter, state the position, and an analysis of whether the recommended position and the current State Bar position are in conflict.**

None that we are aware of.

### **Fiscal implications of the recommended policy to the State Bar of Michigan:**

None that we are aware of.